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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 61 89

THE UNITED STATES OF AMERICA,
Appellant,

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INCORPORATED, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

STATEMENT OF SIMPSON BROS., INC., OPPOSING JURISDICTION

JOHN F. HILLYARD,
Counsel for Appellee.

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BLEED THROUGH

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1947

Criminal Action No. 294-48

UNITED STATES OF AMERICA

vs.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.

STATEMENT OPPOSING JURISDICTION

Comes now the defendant, Simpson Bros., Inc., by its attorney, and in opposition to the assertion of Petitioner, that the Supreme Court has jurisdiction of the appeal filed herein, states that the judgment dismissing the indictment herein was based by the Lower Court upon the deficiency of the indictment as a pleading as distinguished from a construction of the statute upon which the indictment is based.

Argument

This respondent concedes that if the judgment below was based solely on a construction of the statute upon which the indictment is based, then the petitioner is correct in making direct appeal to the Supreme Court.

In order to conclusively show, however, that petitioner has directed its appeal improvidently, this respondent feels

it necessary to cite but one case, *i. e., United States* v. *Borden,* 308 U. S. 188. In that case the indictment consisted of four counts. Mr. Chief Justice Hughes delivered the opinion of the Court, and the following is quoted from the opinion:

> "The established principles governing our review are these:
>
> (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. • • •
>
> First: The first two of these principles, *(supra)* as the Government concedes, preclude our review of the decision below as to count three. For that count was held bad upon the independent ground that it is defective as a pleading, being duplicitous and also lacking in definiteness. (Cases cited). The appeal as to count three must be dismissed."

In this case, the Court below ruled as follows on the indictment which consisted of only *one* count:

> "THE COURT: The Motion to Dismiss is in two parts; one, that it is duplicitous and the other that the indictment is bad in substance.
>
> "The court holds that the indictment is not duplicitous.
>
> "As to the second ground, namely, that this indictment does not charge a crime, the court grants the Motion to Dismiss, *believing that there has been a failure to set forth sufficient facts* (Italics supplied).
>
> "In doing this, I am not holding that the Sherman Act would not under any circumstances be applicable to a case involving a cooperative. I recognize and subscribe—as I must— to the determination in the Borden case, which holds that cooperatives are not exempt from the Sherman Act. I merely hold that the indictment in this case does not set forth sufficient facts to con-

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stitute a conspiracy in violation of Section III of the Sherman Act, in the view that I take of that act and other acts referred to in argument and judicial precedents presented."

It is quite clear, therefore, that the lower Court ruled that the indictment was defective as a pleading.

Therefore, under the holding in the *Borden* case, the lower Court's judgment is not appealable directly to the Supreme Court of the United States.

The Petitioner should have directed its appeal through the proper channel which is the United States Court of Appeals for the District of Columbia.

This defendant prays that the appeal of Petitioner be denied.

Respectfully submitted,

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